

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MIRIAM JONES

Claimant

VS.

COMMUNITY LIVING OPPORTUNITIES

Respondent

AND

KANSAS EMPLOYERS W.C. FUND

Insurance Carrier

Docket No. **1,049,316**

ORDER

Respondent and its insurance carrier request review of the two April 20, 2011 Orders Referring Claimant for Independent Medical Evaluation entered by Administrative Law Judge Brad E. Avery.

ISSUES

At the conclusion of the regular hearing, held on April 19, 2011, the Administrative Law Judge (ALJ) told the parties that he was going to send the claimant for independent medical examinations and if the parties chose to take the doctors' depositions he would grant extensions of the terminal dates. On April 20, 2011 the ALJ issued an Order Referring Claimant for an Independent Medical Examination (IME) with Dr. James Eyman to provide an opinion whether claimant's accidental injury caused, aggravated or accelerated claimant's psychological condition, if any. Dr. Eyman was further asked to opine whether claimant required additional treatment but if claimant was at maximum medical improvement the doctor was then asked to provide a functional impairment rating. The ALJ, on April 20, 2011, also issued an Order Referring Claimant for an Independent Medical Examination with Dr. Peter Bieri to provide recommendations whether future medical treatment was appropriate. And the doctor was asked to provide restrictions as well as opinions apportioning any preexisting impairment and opinions regarding loss of task-performing ability, if any.

The respondent requests review of the two orders. Respondent argues the two orders impermissibly delegate to the doctors the ALJ's authority to determine whether claimant suffers psychological or left knee injuries which arose out of and in the course of her employment.

Claimant argues that the appeal should be dismissed as the ALJ was well within his discretion to order independent medical examinations at this juncture of the claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

At the conclusion of the regular hearing, the ALJ told the parties that he elected to exercise his discretion and send claimant for independent medical examinations. Accordingly, the ALJ appointed Drs. James Eyman and Peter Bieri to serve as independent medical examiners and conduct an IME pursuant to K.S.A. 44-510e(a) and/or K.S.A. 44-516. The Order to Dr. Eyman requested that he provide an opinion whether claimant's accidental injury caused, aggravated or accelerated claimant's psychological condition, if any. Dr. Eyman was further asked to opine whether claimant required additional treatment and if claimant was at maximum medical improvement the doctor was then asked to provide a functional impairment rating. The Order to Dr. Bieri requested that he provide recommendations whether future medical treatment was appropriate. And the doctor was asked to provide restrictions as well as opinions apportioning any preexisting impairment and loss of task-performing ability, if any.

Respondent appealed both Orders alleging the ALJ impermissibly delegated his authority to the doctors. The difficulty with respondent's position is that the ALJ did not delegate to the doctors the authority or ability to make the ultimate decision regarding any of the issues. The ALJ simply sought additional medical opinions which he would then consider along with all the evidence to make the necessary decisions regarding the disputed issues.

The Orders at issue do not establish compensability, nor are the Orders for medical treatment. Thus, the orders are neither a preliminary award of benefits entered under the preliminary hearing statute, nor are they final awards. The Board has previously held that an order for an IME is an interlocutory order.¹ K.S.A. 2009 Supp. 44-551(i)(1) limits the Board's jurisdiction to review of "final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a made by an administrative law judge..." The ALJ's Orders referring claimant for an IME are, in the Board's view, interlocutory in nature.

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. However, the Board has

¹ See, e.g., *Scott v. Total Interiors*, No. 244,761, 2000 WL 1134444 (WCAB July 28, 2000); *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1999 WL 288895 (WCAB Apr. 2, 1999).

recognized an exception to this general rule.² In *Skahan*³, the Court of Appeals set out three criteria whereby an order may be final even if it does not resolve all issues between the parties. The order may be final if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. In the Board's view, an order referring claimant for an IME does not satisfy these three criteria. The order for an IME will not conclusively determine the disputed question of claimant's ultimate impairment. That issue will remain to be decided by the ALJ and can be considered on appeal from the Award that is eventually issued. For these reasons, the Board finds that there is no jurisdiction to consider this appeal.

K.S.A. 44-510e(a) provides in relevant part:

If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

K.S.A. 44-516 states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

Under both of these sections, the ALJ is authorized to order a physician to conduct an IME. And while K.S.A. 44-510e(a) contemplates at least two opposing medical opinions will be offered as a precursor to the appointment of a physician to conduct an IME, there is nothing within K.S.A. 44-516 that limits the ALJ's authority or discretion as to when that IME can be appointed. Here, it appears that, the ALJ believed that additional voices weighing in on the issue of claimant's need for additional treatment, impairment, restrictions and task loss, would prove helpful. Based upon this record, the Board finds the ALJ did not exceed his jurisdiction in ordering the IMEs.

² *Rhodeman v. Moore Management*, No. 234,890, 1999 WL 1008029 (WCAB Oct. 12, 1999).

³ *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).

WHEREFORE, it is the finding, decision and order of the Board that the Orders of Administrative Law Judge Brad E. Avery dated April 20, 2011, remain in full effect and respondent's appeal is hereby dismissed.

IT IS SO ORDERED.

Dated this _____ day of June, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy G. Riling, Attorney for Claimant
Clinton D. Collier, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge